

# Didn't the EU Learn That These Rule-of-Law Interventions Don't Work?

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When Hungary first starting doing down the path to autocracy after 2010, EU officials were quick to recall the “failed” case of Austria in 1999. At that time, the far-right Freedom Party, which had come second in the national elections that year, joined the Austrian coalition government, sparking a general panic among leaders across the EU that the EU would soon contain a government with a neo-Nazi program. To express its concerns, all of the 14 other EU Member States issued coordinated bilateral sanctions against Austria in February 2000, bypassing the sanctions already available in Article 7 which had just come into EU law through the Treaty of Amsterdam but which then did not include a preventive mechanism (the equivalent of today’s Article 7(1) did not materialise until after the entry into force of the Nice Treaty on 1 February 2003).

The immediate effects of the sanctions were mixed. Shortly after sanctions were announced, Jörg Haider, head of the Freedom Party, left the government, taking some toxicity out of the coalition. But fully two-thirds of the Austrian public, nearly double the number of those who had voted for the Freedom Party in the first place, opposed the sanctions. Protests across Europe from a wide range of groups also objected to the political pressure placed on Austria. Within a few months during which the Austrian government did nothing radical to justify the diplomatic sanctions, EU Member States concluded that they had overreacted. A committee of “wise men” appointed by the Council of Europe was dispatched to assess the situation and to give the EU Member States a cover for backing down gracefully. In September 2000, the wise men recommended that the sanctions be ended, and EU Member States gratefully called a halt to a program that most had concluded they should not have started in the first place (we might note that the new government in Austria, elected in late 2017, has again brought the Freedom Party into the governing coalition, but this time without an official peep from the EU).

The 2000 sanctions against Austria were deeply impressed into the consciousness of EU officials as a negative model by the time the Hungarian government started dismantling its constitutional order after 2010. EU officials watched Hungarian developments with concern, but were determined that “the Austrian case” should not be repeated. Even as late as September 2015, Vice President Timmermans repeated the common wisdom in a speech at Tilburg University:

I believe that the case of Austria, with Jörg Haider’s party joining the government, has weakened the EU’s capacity to react in such a case. It was a political response which completely backfired at the time, and since then Member States have been reluctant to take issue with other Member States on this basis.

Vice-President Timmermans has evidently changed his mind since 2015 with regard to Poland, but of course Hungary had already consolidated one-party control by the time Timmermans spoke. The Austrian case clearly haunted the Commission when it could have, but did not, take effective action to stop rule of law backsliding in Hungary. Sanctions, they believed, would be counterproductive when dialogue could work.

Should the Commission have concluded from the Austrian episode that sanctions would always backfire when used against a Member State? We think not. If Austrians disapproved of sanctions in 2000, that memory seems to have faded. Among other things, Austrians are now above the EU average in attachment to the EU. Even with the 2017 election of a government that includes Eurosceptics, polls just before that election showed that more than 70% of Austrians wanted to stay in the EU. If sanctions pushed Austrians away from the EU in 2000, the effects were temporary.

There is a negative lesson to be learned from the Austrian case, but not the one that the Commission has taken away from it.

We are inclined to agree with our colleague Jan-Werner Müller that the Austrian problem was not that the EU acted at all (even if outside the Treaties), but rather that it acted too soon. The EU coordinated bilateral sanctions against Austria when the Austrian government had not yet done anything objectionable. By contrast, in both Hungary and in Poland now, the governments have acted not just once, but in systematic ways over a sustained period of time to eliminate checks on the power of the governing party's leadership. If Austria was the dog that did not bark, Hungary and Poland are, by now, howling so all should hear. Surely these are different cases.

The Austrian case reveals another way in which the EU learned the wrong lesson from its first experiment with sanctions. Even though a mechanism existed in the EU Treaties at the time of the "Haider affair" to sanction a Member State by removing that Member State's vote in European decision-making, that lawfully available route was not taken in 2000. Instead, the Member States stepped outside the treaty framework to develop their own coordinated bilateral sanctions. The wise men's report found this problematic and strongly recommended treaty change to create a prior stage in the sanctions process that would allow the Member States to stay within EU channels by first monitoring situations and issuing warnings before breaches occurred:

117. We strongly recommend the development of a mechanism within the EU to monitor and evaluate the commitment and performance of individual Member States with respect to the common European values. We are therefore in favour of the introduction of preventive and monitoring procedures into Article 7 of the EU Treaty, so that a situation similar to the current situation in Austria would be dealt with within the EU from the very start. This would underline the fundamental commitment of the EU to common European values. Such a mechanism would also allow from the beginning an open and non-confrontational dialogue with the Member State concerned.

Spurred on by this report, the current Article 7(1) TEU, the preventive arm, was added to EU primary law in the Treaty of Nice. By 2004 when the Big Bang accession of 10 Member States to the EU occurred, the EU Treaties included both a mechanism for monitoring and warning (now Article 7(1)) and a mechanism for sanctioning (now Articles 7(2) and (3)) those Member States that violated basic values of the EU. As Professor Sadurski has discovered, these mechanisms were put in place precisely because the old EU Member States became concerned about the new and more newly democratic ones.

That said, when Hungary started going down the road to autocracy after 2010, the EU again showed that it had learned another wrong lesson from Austria. In the Austrian case, the EU had been reluctant to act with the disciplinary arm of Article 7 when a (then non-existent) preventive arm might have been potentially the better response. In the Hungarian case, the EU again proved itself reluctant to act within the Treaties as written, wanting yet another option that did not exist. Instead, the Commission invented its new rule of law framework as a possible preliminary stage to the preventive arm in Article 7(1), which was itself invented after the Austrian case as a possible preliminary stage to the sanctioning mechanism in Articles 7(2) and (3).

The precedent that Austria seems to have set is this: every time there is a challenge to EU values, the EU seeks refuge in a new framework that avoids using its existing powers.

Now that the Commission has triggered the preventive arm of Article 7, however, perhaps the spell has been broken. But, as we have already noted, we are well beyond the “risk of a breach” in the case of Poland and are already well into the territory where the rule of law has nearly vanished. In Hungary, the rule of law has disappeared without a sign that the Commission is willing signal that Article 7 breaches are in sight. The Commission still does not seem to be able to fit the tool to the challenge. That said, the European Parliament has now voted to prepare a report on Hungary that would serve as the basis for the Parliament to trigger Article 7(1) against the Hungarian government. It, at least, seems not to be misled by the Austrian case.

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SUGGESTED CITATION Scheppele, Kim Lane; Pech, Laurent: *Didn't the EU Learn That These Rule-of-Law Interventions Don't Work?*, *VerfBlog*, 2018/3/09, <https://verfassungsblog.de/didnt-the-eu-learn-that-these-rule-of-law-interventions-dont-work/>.